No. 76-1040

In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS SANABRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 548 F. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on December 29, 1976. The petition for a writ of certiorari was not filed until January 29, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On February 11, 1977, petitioner filed a "Motion to Waive Supreme Court Rule 22(2) and Deem Petition for Certiorari Timely Filed."

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a second trial after the district court, at the defendant's request, termininated a prosecution prior to verdict on the ground that the indictment failed to provide sufficient notice of the crime charged.

2. Whether an indictment that clearly describes all of the elements of the crime charged is insufficient because it does not refer to the correct statutory provision.

STATEMENT

1. Petitioner and ten co-defendants were tried before a jury in the United States District Court for the District of Massachusetts on a one-count indictment charging that they conducted—

> an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a pari-mutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Sections 1955 and 2.

The government's case consumed five trial days.[2] At the close of the government's case, all 11 defendants moved for judgments of acquittal. Counsel for petitioner argued that the "numbers" charge against him was made a crime not by Mass. Gen. L., ch. 271, Section 17 (as the indictment had specified) but by Mass. Gen. L., ch. 271, Section 7 (1968) (6 Tr. 22-24). Petitioner had not raised this contention before trial (although pretrial proceedings had consumed three years (Pet. App. 2a)), nor had he raised it earlier in the trial. The district court denied the motions to acquit, and it also denied a motion to strike evidence pertaining to the numbers pool allegation (6 Tr. 38-45). After one of petitioner's co-defendants presented a witness and another a stipulation, all of the defendants rested. The defendants, including petitioner, renewed their motions for judgments of acquittal, and the district court denied them again (6 Tr. 73).

Following a brief recess, however, the district court changed its mind and concluded that "Section 17 [of Mass. Gen. L., ch. 271] does not include the numbers aspect" of the charge (6 Tr. 75-76). On this reasoning the court struck "so much of the evidence in the case as had to do with numbers betting" (6 Tr. 76) but held that the case would be submitted to the jury insofar as the defendants were charged with conducting a horse betting business. The prosecutor told the court that petitioner had been connected by the evidence to the numbers operation but not the horse betting operation, and the court then granted petitioner's motion for a judgment of acquittal (6 Tr. 80-86).

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[2]The evidence adduced by the government showed that the defendants were involved, either as owners or salaried or commissioned workers, in an illegal numbers and horse gambling business in Revere, Massachusetts. The illegal enterprise also involved betting on sporting events other than horse races. The operation was broken up when agents of the Federal Bureau of Investigation raided three locations of the business and seized betting records.

At the resumption of trial the next day, the prosecutor filed motions requesting the court to reconsider the judgment of acquittal, to reconsider the ruling striking the evidence concerning the operation of the number pool, and to permit the government to amend the indictment. Although the district court expressed concern that the defendants had not earlier raised the issue of the alleged defect in the indictment (7 Tr. 10-17),[3] it nevertheless denied the government's motions for reconsideration, stating that it did so with "considerable reluctance" (7 Tr. 18-19). The court indicated that its acquittal of petitioner rested entirely upon its perception that the indictment was defective on its face (7 Tr. 19-20).

The court then submitted the case against petitioner's ten co-defendants to the jury on the theory that they had accepted wagers on horse races. The jury found all ten guilty.

2. The court of appeals held that a second trial of petitioner on the "numbers" aspect of the indictment would not violate the Double Jeopardy Clause, because petitioner had requested the termination of the prosecution and had surrendered his valued right to receive the verdict of the jury. The court of appeals explained (Pet. App. 11a):

> Since [petitioner] voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause.

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[3]Pretrial proceedings in this case had taken three years (Pet. App. 2a).

The court of appeals also concluded that the district court's order terminating the prosecution against petitioner was erroneous. Relying upon *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (C.A. 1), certiorari denied, October 4, 1976 (No. 75-6598), which had held that the citation of Section 17 rather than Section 7 of the Massachusetts statute does not make a federal indictment insufficient, the court of appeals remanded for a second trial (Pet. App. 4a, 12a). This trial is to be confined to the "numbers" aspect of the charge in light of the prosecution's failure, at the first trial, to connect petitioner to the horse betting aspect of the gambling operation; the United States did not seek a second trial on the horse betting aspect of the charge.

DISCUSSION

1. The double jeopardy considerations presented by this case are similar to those in *Lee* v. *United States*, No. 76-5187, certiorari granted, January 10, 1977. In *Lee* the defendant moved, after the commencement of a bench trial, to dismiss the information on the ground that it failed to apprise him of all of the elements of the offense. The district court took the motion under advisement, heard evidence, and later dismissed the information. Lee was indicted and tried a second time; his case presents the question whether that second trial violated the Double Jeopardy Clause.

Here, as in *Lee*, after the trial began petitioner moved for a judgment in his favor on the ground that the indictment was facially defective. Here, as in *Lee*, the district court granted that motion after all of the evidence had been received, but without purporting to resolve any factual disputes. There are three differences between this case and *Lee*, none of which justifies more favorable treatment for petitioner: (i) in *Lee* the defendant moved to dismiss the information before the technical "attachment" of jeopardy (but after the trial had begun), whereas here petitioner did

not attack the sufficiency of the indictment until the sixth day of trial; (ii) in *Lee* the information was indeed defective, whereas here petitioner was not entitled to the relief he sought (see page 10, *infra*); (iii) in *Lee* the district court stated that it was dismissing the information, whereas here the court stated that it was acquitting petitioner.[4]

Although jeopardy did not "attach" in *Lee* until after the motion to dismiss was made, we have argued (*Lee* Br. 31-36) that this is not fatal because Lee himself brought this about by delaying, until after the prosecutor's opening statement, making his attack upon the charge; the delay that took place in the instant case was even more pronounced.[5]

We have argued in *Lee* (Br. 14-27) that a defendant who moves in mid-trial to terminate the proceedings against him cannot raise a double jeopardy objection if the prosecutor seeks to try him again. See *United States* v. *Dinitz*, 424 U.S. 600. If the first trial was properly terminated, as in *Lee*, a second trial is permissible if the defect can be corrected. If the first trial should not have been terminated—if, as here, the defendant seeks and receives a form of relief to which he is not entitled—a second trial may follow a reversal on appeal.[6]

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[4]We have furnished to counsel for petitioner a copy of our brief in *Lee*.

[5]See *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (a defendant who has an opportunity to have legal issues resolved before trial, but who intentionally waits until jeopardy has attached before seeking their resolution, cannot object on double jeopardy grounds to another trial).

[6]Cf. *Serfass* v. *United States*, 420 U.S. 377, 394, which reserves the question presented here: whether a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense can interpose a double jeopardy objection to a second trial when the district court erroneously accepts his defense.

It does not make a difference that the termination in *Lee* was called a dismissal of the information, while the termination in the present case was called an acquittal. As the Court explained in *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 7, "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." Here, as in *Lee*, the district court has done no more than conclude that the charge was defective on its face; in the words of the court of appeals (Pet. App. 8a-9a), "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding [petitioner's] conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's interest in preserving a district court's ruling that he is not criminally responsible." In *Martin Linen*, by contrast, the district court's action was a true acquittal because (slip op. 8) the court "evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction." In the present case the district court did not examine the sufficiency of the evidence pertaining to the numbers crime; it ruled, instead, that the indictment did not adequately charge the numbers offense.

If the Court accepts our major argument in *Lee*, therefore, it would follow directly that petitioner may be tried a second time. If, however, the Court should conclude in *Lee* that the attachment of jeopardy after the defendant had moved to dismiss, a factor not present here, is important, then it might not reach our major argument. If the Court should decide *Lee* in a way that leaves open any important questions concerning the propriety of the approach we have taken, then we believe that the Court should grant review in another case presenting similar questions. It could grant

review of the instant case, of *United States* v. *Scott*, 544 F. 2d 903 (C.A. 6), petition for a writ of certiorari pending, No. 76-1382, or of both. This case and *Scott* would offer the Court the opportunity to address whatever questions may be left open by *Lee*.[7]

2. Petitioner's other arguments do not warrant review by this Court, and if it grants review of this case it should limit the grant to questions 1 and 2 of the petition, which, taken together, raise the first question we have reformulated at page 2, *supra*.

a. Petitioner contends (Pet. 13-18) that the appeal in this case was not authorized by the Criminal Appeals Act, 18 U.S.C. 3731, because the district court's order should be viewed as a mid-trial order suppressing evidence. But the district court's decision was based entirely upon the sufficiency of the indictment; the court held that the indictment was defective on its face. This is a legal decision of the sort that can be appealed under the first paragraph of Section 3731. As the Court explained in *United States* v. *Wilson*, 420 U.S. 332, 337, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." See also *United States* v. *Martin Linen Supply Co.*, *supra*, slip op. 3-4. Consequently, the only

[7] In *Scott* the district court, at the close of all the evidence, dismissed one count of the indictment at Scott's request because of preaccusation delay. The court of appeals dismissed our appeal, holding that the Double Jeopardy Clause precludes a second trial. *Scott* unquestionably involves an order dismissing the indictment rather than granting a true acquittal (see *United States* v. *Martin Linen Supply Co.*, *supra*, slip op. 1 n. 1 (Stevens, J., concurring)); although the dismissal was based on the evidence heard at trial, the dismissal did not resolve the general issue. We have furnished a copy of our petition in *Scott* to counsel for petitioner.

question that an appellate court need consider in an appeal by the United States is whether the Double Jeopardy Clause would bar a second trial if the government were to prevail on appeal.

It is unimportant that the district court excluded all of the "numbers" evidence before terminating the proceedings against petitioner. That exclusion of evidence was based upon the district court's belief that the indictment was defective. The United States did not appeal the exclusion of evidence under the second paragraph of Section 3731; it appealed, instead, under the first paragraph of Section 3731.[8] The appeal is authorized because the district court's "acquittal" terminated the proceedings in petitioner's favor, and the first paragraph, as interpreted in *Wilson* and *Martin Linen*, authorizes an appeal from an order terminating the prosecution unless the Double Jeopardy Clause bars the way.

b. Petitioner also contends (Pet. 10-12) that Section 3731 does not authorize an appeal from an order dismissing part of a count of an indictment but not all of the count. The court of appeals considered and rejected this argument (Pet. App. 4a-7a); we rely upon its opinion. As we have pointed out, the Criminal Appeals Act removes all non-constitutional bars to appeals by the United States in criminal cases. Moreover, even if the Act were read as requiring appeals only from dismissals of entire counts of

[8] It is true, as petitioner points out, that the second paragraph of the Criminal Appeals Act does not authorize appeals from orders entered after the attachment of jeopardy and prior to verdict. But the second paragraph deals only with *interlocutory* appeals, and the purpose of the limitation was to prevent the interruption of an ongoing trial by an interlocutory appeal. Once the trial has ended in a final judgment, however, the prosecution's right to appeal is conferred by the first paragraph. See also Pet. App. 6a n. 5.

indictments, that condition would be satisfied here. The district court terminated the entire prosecution with respect to petitioner. Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be proved in several ways. The court of appeals' decision to limit the second trial to proof of the "numbers" operation did not deprive it of jurisdiction.

c. Petitioner finally argues (Pet. 21-22) that the court of appeals erred in holding that the indictment was sufficient. But the indictment alleged all of the elements of the offense. Petitioner conceded at trial (7 Tr. 15) that the citation to the wrong section of Massachusetts statute did not hinder his defense or deprive him of notice of any element of the crime he is alleged to have committed. Since the failure to cite the correct statute is not a reason to dismiss an indictment in the absence of prejudice, the miscitation was not a fatal flaw. Fed. R. Crim. P. 7(c)(3); *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Morrison, supra.*[9]

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[9]Petitioner relies (Pet. 21) upon *United States* v. *Prejean*, 494 F. 2d 495 (C.A. 5), for the proposition that the failure to cite the proper section of the statute deprived him of his Fifth Amendment right to indictment by grand jury. But the grand jury charged explicitly that petitioner accepted, recorded, and registered bets on a "numbers" pool, and petitioner does not contend that this charge omits any element of the Massachusetts crime. The right to be indicted by a grand jury comprehends only a right to have the grand jury state all of the elements of the offense. In *Prejean*, upon which petitioner erroneously relies, the defendant was tried on an indictment charging different elements from those of the crime established by the statute that should have been cited. In *Prejean* there was no way to know whether the grand jury would have made the allegations necessary to establish the elements of the offense under which the defendant should have been charged; quite the contrary is true here, for the grand jury charged all of the elements of the correct offense and then simply cited the wrong section of the statute.

CONCLUSION

Consideration of the petition should be deferred pending the Court's decision in *Lee*.

Respectfully submitted.

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